United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

77-7175

To be argued by
SPIROS A. TSIMBINOS

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

G. THOMAS CESTARO, CATHERINE CESTARO, RICHARD MARCHETTI and STA-BRITE AUTO PAINTING CORP.,

Plaintiffs-Appellants,

- against -

THOMAS J. MACKELL, JAMES D. ROBERTSON, FREDERICK J. LUDWIG, JOSEPH N. MONTY, DAVID J. McKEON, SALVATORE GIUFFREDA, JOHN SAVAGE, BERNARD NELSON, CHARLES NAPOLITANO, STUART B. STILLMAN, AVIS RENT-A-CAR SYSTEM, INC., and INTERNATIONAL TELEPHONE & TELEGRAPH CORPORATION,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLEE JOSEPH N. MONTY

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UNITED STATES COURT OF APPEALS
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Defendants-Appellees.

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BRIEF FOR DEFENDANT-APPELLEE JOSEPH N. MONTY

Preliminary Statement

This is an appeal from an order of the Honorable George C. Pratt, Judge of the United States District Court for the Eastern District of New York, dated March 17, 1977 granting defendants-appellees' motion to dismiss the complaint as barred by the applicable statute of limitations and the judgment entered thereon.

STATEMENT OF FACTS

From 1963 until April of 1971 the plaintiff Sta-Brite Auto Painting Corp. repaired vehicles for Avis Rent-A-Car System, Inc. Sometime in 1970 or early 1971 charges were made by Avis against Sta-Brite and its corporate officers for the illegal submission of fraudulent repair bills. An investigation was conducted by members of the Queens County District Attorney's Office and in May of 1971 an indictment was brought against all of the plaintiffs alleging numerous counts of criminal activity. A trial of the criminal charges was commenced on June 8, 1972 but prior to the completion of the trial a plea arraignment was entered into whereby the plaintiff Sta-Brite was allowed to plead to grand larceny in the third degree, a Class E felony, under New York Law and all other charges were dismissed. The plaintiffs executed a general release in favor of the Queens District Attorney's Office.

The plaintiffs never sought to perfect an appeal to the appropriate state courts and subsequently withdrew a motion to vacate the original plea.*

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* It appears obvious that the negotiated plea was of great benefit to the plaintiff Cestaro, as it removed him from possible jeopardy as to his attorney's license as well as criminal penalties, and that he is desirous of retaining the benefits of his bargain while at the same time bringing this frivolous claim.

On April 12, 1976, almost four years after the termination of the criminal case, the plaintiffs filed a complaint alleging violation of their civil rights based upon an alleged "conspiratorial agreement between the Avis defendant and members of the Queens District Attorney's office, including the appellee Joseph Monty who held the office of Chief Investigator in the Queens District Attorney's office at the time.

On March 17, 1977 in a lengthy decision and after considering lengthy memoranda of law and oral argument the Honorable Judge Pratt dismissed the plaintiffs' claim as being barred by the statute of limitations.

POINT I.

THE DECISION AND JUDGMENT OF THE COURT BELOW WAS CORRECT AND SHOULD BE AFFIRMED.

An action such as that brought by the plaintiffs is subject to the statute of limitations the state court would apply in an analogous situation. Accordingly, the three year statute of limitations under the New York Statute is applicable to the case at bar. Ortiz v. Lavalle, 442 F.2d 912 (2nd Cir. 1971); Swan v. Board of Education, 319 F.2d 56 (2nd Cir. 1963); Kaiser v. Cahn; 510 F.2d 282 (2nd Cir. 1974); Meyer v. Frank, 550 F.2d 726 (2nd Cir. 1977). In an effort to bypass the obvious problem that the plaintiffs filed their case more than three years after a cause of action arose, the plaintiffs in the court below pursued three tortured lines of reasoning.

As to the last overt act:

Plaintiffs allege that in September or October of 1973 a former Avis employee's acting on behalf of Avis offered Cestaro money to prevent his testimony at a hearing of the State Legislative Committee. Plaintiffs contended this constituted a last overt act of an on-going conspiracy which caused the three year statute to commence as of that date. Plaintiffs' allegations regarding this matter in paragraph 41 of their complaint (A1-13a)* no where mentions the appellee Monty's knowledge of, adherence to,

*A refers to Appellants Appendix.

or participation in any such alleged activity.

According to the plaintiffs, the September bribe offer occurred more than a year after the plaintiffs' trial and they seek to infer a conspiratorial link involving the appellee Monty when they specifically failed to provide a basis upon which such an inference can be drawn. The court below also correctly concluded that the doctrine of the last overt act was inappropriate to the case at bar since no actual injury was alleged to have been caused to the plaintiffs (citing Mizell v. North Broward Hospital District, 427 F.2d 475 (5th Cir. 1970); Hoffman v. Holden, 268 F.2d 280 (2nd Cir. 1959).

As to Concealment:

Plaintiffs allege that they had no material facts or basis to commence an action until Legislative hearings in May of 1973. Plaintiffs, in their own complaint at paragraphs 19 through 35, make numerous allegations which, if true, would have given rise to legitimate legal action on their behalf. These allegations of confiscation of vehicles, improper prosecution, false publicity, etc., were as stated by plaintiffs, known to them in 1971 and 1972, yet they made no effort to commence a suit at that time. The

concealment doctrine does not relate to additional factors upon which a suit may be brought, but whether through total fraud or concealment the defendant was prevented from having any basis to commence an action.

The court below assuming arguendo that the plaintiffs did not learn of their cognizable claim until the Legislative hearing in May of 1973 held nevertheless that the New York State Statute C.P.L.R. Section 203(f) would nevertheless provide only for a two year period from the date of discovery. The court below amply discussed the history of C.P.L.R. Section 203 and the reason for its application to the case at bar, and appellee Monty relies on such reasoning and urges its acceptance by the court. In addition, in Meyer v. Frank, 550 F.2d 726 (2nd Cir. 1977) relied upon by appellants this court clearly recognized as a prime consideration the "plaintiffs' conduct particularly his diligence in pressing his claim". In the case at bar the plaintiffs clearly had ample time in which to commence an action and failed to do so.

POINT II

THE COMPLAINT FAILS TO STATE A CLAIM AGAINST THE APPELLEE MONTY.

The appellee Monty also moved in the court below for a dismissal of the complaint under Rule 12(b) of the Federal Rule of Civil Procedure and for summary judgment under Rule 56(b). No where in the plaintiffs' complaint are specific acts of wrong doing by the appellee Monty stated as being on personal knowledge. Plaintiffs rely solely on an alleged press release which contains nothing more than hearsay allegations. Hearsay conclusions or allegations appearing in papers are insufficient to raise genuine issues of fact. Applegate v. Top Associates, Inc., 425 F.2d 92 (2nd Cir. 1970).

POINT III

THE APPELLEE MONTY ADOPTS THOSE POINTS AND ARGUMENTS ADVANCED BY THE OTHER APPELLEES WHICH HAVE RELEVANCE AND ARE APPLICABLE TO HIM.

CONCLUSION

THE JUDGMENT OF THE DISTRICT COURT SHOULD BE AFFIRMED.

Respectfully submitted,

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JUN 30 1977

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JUN 30 1977

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